

PROGRAM POLICY MEMORANDUM-Protection and Safety #2-98

October 13, 1998

TO: Service Area Administrators  
Protection and Safety Staff  
IM Foster Care Staff  
Supervisors/Managers of Resource Development  
Service Area Contract Liaisons  
Protection and Safety Legal Team

FROM: Chris Hanus-Schulenberg, Co-Administrator  
Protection & Safety

RE: Clarification on Implementation of LB 1041 and the Adoption and Safe Families Act

In this memo, reference will be made to the Adoption and Safe Families Act, which includes both the federal act and LB 1041, which is Nebraska's version of the Act. The acronym ASFA will be used.

As we've begun implementation of ASFA, questions have arisen. The intent of this memo is to provide the Department's answers to those questions, pending revision of policy and guidebook.

1. Does the law apply to HHS wards, or only to children adjudicated as abused or neglected?

ANSWER: THE OPINION OF HHS IS THAT ASFA APPLIES TO ALL HHS WARDS, REGARDLESS OF THE ADJUDICATION. THIS INCLUDES CHILDREN IN VOLUNTARY PLACEMENT, STATUS OFFENDERS, DEPENDENCIES, AND DELINQUENTS.

IT IS CRITICAL THAT PARENTS BE MADE AWARE OF 15/22 RULE. WHEN A CHILD IS REMOVED FROM HOME, THE WORKER SHOULD PROVIDE THAT INFORMATION IN WRITING TO THE PARENT VERY EARLY, PREFERABLY THE TIME OF REMOVAL OR AT THE FIRST MEETING WITH THE PARENT AFTER REMOVAL.

WHEN A VOLUNTARY PLACEMENT OCCURS, THE WORKER SHOULD ADD THE FOLLOWING STATEMENT TO THE VOLUNTARY PLACEMENT AGREEMENT: "I, (the parent), UNDERSTAND THAT IF, AT ANY TIME, MY CHILD HAS BEEN IN OUT-OF-HOME CARE UNDER THE STATE'S RESPONSIBILITY FOR 15 OF THE MOST RECENT 22 MONTHS, A DETERMINATION MUST BE MADE WHETHER A PETITION FOR TERMINATION OF PARENTAL RIGHTS WILL BE FILED. TIME IN VOLUNTARY OUT-OF-HOME PLACEMENT WILL BE COUNTED AS PART OF THE 15 MONTHS."

2. Does the law apply to Native American children?

ANSWER: THE LAW APPLIES TO ALL CHILDREN IN HHS CUSTODY AND THOSE FOR WHOM IV-E PAYMENTS ARE BEING MADE UNDER IV-E CONTRACTS WITH COURTS AND TRIBES. IF A CHILD FALLS UNDER THE INDIAN CHILD WELFARE ACT AND THERE APPEARS TO BE A CONFLICT BETWEEN THE REQUIREMENTS OF THE TWO ACTS, THE WORKER SHOULD CONTACT THE PROTECTION AND SAFETY LEGAL TEAM FOR ASSISTANCE.

3. The law requires that a petition for termination of parental rights be filed under some circumstances, including the child being in out-of-home care under the responsibility of the State for fifteen or more of the most recent twenty-two months (15/22 rule), and certain actions of the parent against the child in question or another child of the parent. The law allows for a petition of termination of parental rights not to be filed if certain other conditions exist.

Question A: Who determines if an exception to the requirement for filing of a TPR petition exists?

ANSWER: THE COURT. THE DEPARTMENT CAN RECOMMEND IN ITS REPORT THAN AN EXCEPTION IS PRESENT, BUT ONLY THE COURT CAN MAKE THE ACTUAL DETERMINATION.

Question B: Does the law require an order directing that a TPR petition be filed?

ANSWER: NO. THE LAW DOES NOT REQUIRE THAT A COURT ISSUE AN ORDER DIRECTING THAT A TPR PETITION BE FILED AT ANY TIME IN A JUVENILE CODE PROCEEDING. THE LAW REQUIRES A PERMANENCY HEARING AT WHICH THE COURT IS TO DETERMINE WHETHER ANY ONE OR MORE OF THE EXCEPTIONS APPLY. THE COURT NEED DO NO MORE THAN MAKE A FINDING OF FACT. IF THE COURT FINDS THAT NO EXCEPTION APPLIES, THEN THE STATE MUST FILE A TPR ACTION; THERE IS NO NEED FOR A SPECIFIC COURT ORDER DIRECTING THAT SUCH A FILING OCCUR.

IF THE DEPARTMENT'S CASE PLAN AND COURT REPORT CLEARLY STATE ONE OR MORE EXCEPTIONS AS APPLICABLE, THE COURT'S APPROVAL OF THE CASE PLAN AND COURT REPORT ARE SUFFICIENT TO MEET THE REQUIREMENT OF A COURT FINDING.

4. Must a permanency hearing be held on every child in out-of-home care for 15 of the most recent 22 months for the purpose of determining if an exception applies?

ANSWER: NO. NO PERMANENCY REVIEW IS REQUIRED IF:

A. THE COURT ALREADY HAS MADE A FINDING OF FACT THAT ONE OF THE ALLOWABLE EXCEPTIONS APPLIES; B. TPR PETITION HAS BEEN FILED; C. PARENTAL RIGHTS OF BOTH PARENTS ALREADY HAVE BEEN EXTINGUISHED, BY TPR, VOLUNTARY RELINQUISHMENT, OR DEATH.

THE REVIEW MUST OCCUR FOR OTHER CHILDREN EVEN IF THEY ARE IN INDEPENDENT LIVING SITUATIONS OR IN LONG-TERM FOSTER CARE.

IN SOME CASES, A PERMANENCY REVIEW TO DETERMINE IF AN EXCEPTION APPLIES WILL BE REQUIRED PRIOR TO THE CHILD REACHING 15 OF 22 MONTHS IN OUT—OF-HOME CARE. STATUTE REQUIRES THE FOLLOWING: IF REASONABLE EFFORTS TO PRESERVE AND REUNIFY THE FAMILY ARE NOT REQUIRED DUE TO A COURT DETERMINATION THAT THE PARENT HAS SUBJECTED THE CHILD TO AGGRAVATED CIRCUMSTANCES; HAS COMMITTED CERTAIN ACTS AGAINST THE CHILD OR ANOTHER CHILD OF THE PARENT; OR HAS HAD RIGHTS TO ANOTHER CHILD OF THE PARENT TERMINATED, A PERMANENCY HEARING MUST BE HELD WITHIN 30 DAYS. ONE OF THE PURPOSES OF THE HEARING IS TO DETERMINE IF THE COURT WILL MAKE A FINDING THAT ONE OF THE EXCEPTION APPLIES.

THE LAW ALSO REQUIRES THAT EACH CHILD IN FOSTER CARE UNDER THE SUPERVISION OF THE STATE SHALL HAVE A PERMANENCY HEARING BY A COURT, NO LATER THAN TWELVE MONTHS AFTER THE DATE THE CHILD ENTERS FOSTER CARE AND ANNUALLY THEREAFTER DURING THE CONTINUATION OF FOSTER CARE. THE COURT'S ORDER SHALL INCLUDE A FINDING REGARDING THE APPROPRIATENESS OF THE PERMANENCY PLAN DETERMINED FOR THE CHILD AND SHALL INCLUDE WHETHER, AND, IF APPLICABLE, WHEN, THE CHILD WILL BE:

- A. RETURNED TO THE PARENT;
- B. REFERRED TO THE STATE FOR FILING OF A PETITION FOR TPR;
- C. PLACED FOR ADOPTION; OR
- D. REFERRED FOR GUARDIANSHIP.

5. What action is HHS required to take if the court finds that no exceptions apply, and the County Attorney does not file a TPR petition?

ANSWER: IF THE COUNTY ATTORNEY DOES NOT MOVE FORWARD IN A TIMELY FASHION, THE WORKER AND SUPERVISOR SHOULD MAKE EFFORTS TO GAIN COOPERATION FROM THAT OFFICE. IF THOSE EFFORTS FAIL, THE WORKER SHOULD CONTACT A PROTECTION AND SAFETY LEGAL TEAM ATTORNEY FOR ASSISTANCE.

6. Who is responsible for payment for paternity test necessary to file a TPR petition?

ANSWER: THE OPINION OF HHS IS THAT HHS IS NOT RESPONSIBLE FOR PAYMENT. CHILD WELFARE FUNDS ARE NOT TO BE AUTHORIZED FOR THIS PURPOSE.

WE CURRENTLY ARE EXPLORING POTENTIAL FUNDING SOURCES. IF TESTING IS REQUESTED EARLY IN THE CASE, WITH THE INTENT THAT CHILD SUPPORT CAN BE ORDERED, THE CASE CAN BE REFERRED TO CHILD SUPPORT ENFORCEMENT, WHICH HAS FUNDING AVAILABLE TO PAY FOR TESTING. HOWEVER, THIS RESOURCE IS NOT AVAILABLE WHEN THE ISSUE CLEARLY IS ONE OF TERMINATION OF PARENTAL RIGHTS.

IF A COURT ORDERS THE DEPARTMENT TO PAY FOR PATERNITY TESTS FOR PURPOSES OF TERMINATING PARENTAL RIGHTS, THE WORKER SHOULD IMMEDIATELY CONTACT A PROTECTION AND SAFETY LEGAL TEAM ATTORNEY FOR ASSISTANCE.

7. Policy says that adoption is not to be listed as a permanency objective until parental rights have been terminated. Does this direction change now that the have ASFA?

ANSWER: YES. ASFA CONTINUES TO REQUIRE THAT REASONABLE EFFORTS BE MADE TO REUNIFY FAMILIES. AS LONG AS THOSE EFFORTS ARE REQUIRED, ADOPTION CANNOT BE LISTED AS THE PLAN. THE CHANGE FOUND IN ASFA IS THAT THE COURT NOW CAN MAKE A FINDING THAT REASONABLE EFFORTS ARE NOT REQUIRED OR NO LONGER ARE REQUIRED. IT IS THE DEPARTMENT'S INTERPRETATION THAT WHEN THE DEPARTMENT MAKES A RECOMMENDATION THAT REASONABLE EFFORTS NO LONGER SHOULD BE REQUIRED, THE DEPARTMENT ALSO SHOULD RECOMMEND WHAT THE NEW PERMANENCY OBJECTIVE SHOULD BE. THE OBJECTIVE WILL BE DETERMINED BY WHAT IS BEST FOR THE CHILD, WHICH MIGHT INCLUDE ADOPTION, GUARDIANSHIP, OR LONG-TERM FOSTER CARE. THE WORKER SHOULD BE CERTAIN THAT THE COURT REPORT EXPLAINS WHY REASONABLE EFFORTS TO REUNIFY SHOULD NOT BE REQUIRED AND SHOULD EXPLAIN WHY THE NEW PERMANENCY OBJECTIVE IS APPROPRIATE.

8. Are the lists sent to each of the 8 districts in 5/98 definitive of cases that must be reviewed prior to 12/31/99?

ANSWER: ASFA (THE FEDERAL ACT) REQUIRES THAT PERMANENCY REVIEWS BE CONDUCTED ON ALL CASES OF CHILDREN IN OUT-OF-HOME CARE UNDER THE STATE'S RESPONSIBILITY FOR MORE THAN 15 OF THE MOST RECENT 22 MONTHS. FOR ALL CHILDREN WHO MET THAT DEFINITION ON A GIVEN DATE (FOR NE THAT DATE WAS JULY 1, 1998), THE PERMANENCY REVIEW MUST BE COMPLETED PRIOR TO 12/31/98); 2/3 WITHIN 12 MONTHS (FOR NE, BY 6/30/99); AND ALL CASES WITHIN 18 MONTHS (FOR NE, BY 12/31/99).

THE LISTS SUPPLIED TO EACH DISTRICT IN 5/98 WERE BASED ON INFORMATION ON JOB 140 AT THE TIME THE LISTS WERE RUN. ALTHOUGH THE LISTS CAN SERVE AS A BASELINE FOR CASES IN NEED OF REVIEW, IT MUST BE RECOGNIZED THAT THEY MIGHT NOT BE "THE FINAL WORD". THE LISTS MIGHT HAVE CASES THAT WON'T NEED TO BE REVIEWED, BECAUSE A TPR PETITION ALREADY HAS BEEN FILED OR COMPLETED, OR BECAUSE THE CASE HAS BEEN CLOSED DUE TO THE CHILD NO LONGER BEING IN HHS CUSTODY. THE LISTS MIGHT NOT INCLUDE CASES THAT MUST BE REVIEWED, BECAUSE OF AN ERROR ON JOB 140. ALSO, THE LISTS DID NOT INCLUDE CHILDREN WHO WERE IN THE CUSTODY OF HHS-OJS. EACH SERVICE AREA MUST TAKE RESPONSIBILITY FOR DOUBLE-CHECKING THE LISTS AND, ULTIMATELY, FOR ASSURING THAT ALL CASES MEETING THE 15/22 RULE AS OF 7/1/98 HAVE THE REQUIRED PERMANENCY REVIEW.

IN ORDER TO ASSURE THAT WE ARE ABLE TO REPORT ACCURATELY TO STAKEHOLDERS IN NEBRASKA AND TO THE FEDERAL HHS, EACH SERVICE AREA IS TO SUBMIT THE FOLLOWING TO MARGARET BITZ:

ON OR BEFORE 1/3/99, 7/31/99, AND 1/31/2000, A COPY OF THE LISTING SENT IN 5/98, SHOWING:

- a. Permanency review held and the date; OR
- b. No permanency review required and the reason, which could include case closed, termination filed, termination completed, parent(s) relinquished, or parent(s) deceased.

IN ADDITION, A LIST IS TO BE INCLUDED FOR WARDS WHO DID NOT APPEAR ON THE ORIGINAL LIST BUT FOR WHOM THE REVIEW WAS REQUIRED BECAUSE THEY MET THE CRITERIA OF OUT-OF-HOME CARE FOR 15 OR 22 MONTHS AS OF 7/1/98.

If you have questions, please contact:

\*Mike Rumbaugh, 471-9148 or DSS0022 or on CCMail, for legal questions

\*Margaret Bitz, 471-9457 or DSSOI 97 or on CCMail, for practice and procedural questions.